No. 05-1342

IN THE

Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER,
MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

—v.—

WACHOVIA BANK, N.A., AND
WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House Association L.L.C. (the "Clearing House") is an association of eleven leading commercial banks that, through an affiliate, provides payment, clearing and settlement services to its member banks and other financial institutions.[1] The members of the Clearing House include eight national banks.[2] These eight national banks, which have combined assets of over $4.45 trillion, carry out important banking activities through their operating subsidiaries.

The Clearing House is dedicated to protecting and promoting the interests of its members and the commercial banking industry. The Clearing House often presents the views of its members on important public policy issues impacting the commercial banking industry by, among other things, appearing as *amicus curiae* in this Court in cases raising significant questions of banking law.

Pursuant to the National Bank Act, 12 U.S.C. § 21 *et seq.*, Clearing House national banks conduct their banking business through operating subsidiaries in all 50 states. The

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[1] This brief is filed with the written consent of Petitioner and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

[2] The Clearing House member national banks are Bank of America, N.A.; Citibank, N.A.; HSBC Bank U.S.A., N.A.; JPMorgan Chase Bank, N.A.; LaSalle Bank, N.A.; U.S. Bank N.A.; Wachovia Bank, N.A. (one of Respondents here); and Wells Fargo Bank, N.A. With respect to the remaining three Clearing House member banks, The Bank of New York and Deutsche Bank Trust Company Americas are state-chartered banks, and UBS AG is subject to U.S. bank regulation under the International Banking Act.

Clearing House has a substantial interest in upholding the uniform, federal regulation of national bank operating subsidiaries. The Clearing House national banks perform important banking activities, including mortgage, auto, small business and student lending, through approximately 1,000 operating subsidiaries; these operating subsidiaries have aggregate assets of more than $500 billion.

Clearing House national banks use operating subsidiaries for a variety of reasons, including to facilitate branding and marketing, to adopt specialized compensation and management structures, to ease the purchase and sale of businesses, and to enhance regulatory reviews and compliance. By conducting their banking activities through operating subsidiaries, Clearing House national banks achieve significant efficiencies. The application of countless, often unpredictable, overlapping and inconsistent state and local restrictions would impose substantial costs and burdens on Clearing House national banks and their customers.

SUMMARY OF ARGUMENT

In 1864, Congress passed the National Bank Act to establish a system of national banks in need of protection from "possible unfriendly State legislation." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1873). This Court has long acknowledged the unique status of national banks and the strict limits that the National Bank Act imposes on the power of states to regulate the banking activities of national banks. *See Easton* v. *Iowa*, 188 U.S. 220, 238 (1903); *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). As confirmed by this Court's rejection of any attempts by states to regulate such banking activities, "[n]ational banks are instrumentalities of the federal government, created for a public purpose, and as such

necessarily subject to the paramount authority of the United States." *Davis*, 161 U.S. at 283.

In Section 24 (Seventh) of the National Bank Act, Congress broadly authorized national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." In doing so, Congress specifically charged the Office of the Comptroller of the Currency ("OCC") with administering this Act and left many parts of that regulatory scheme to implementing regulations of the OCC, which "maintain[s] virtually a day-to-day surveillance of the American banking system." *United States* v. *Phila. Nat'l Bank*, 374 U.S. 321, 329 (1963). For many of the Clearing House national banks, such surveillance occurs through teams of OCC examiners who are permanently on site conducting comprehensive and systematic reviews.

Since 1966, the OCC has expressly recognized that national banks' powers include the authority to conduct their banking business through the business form of the operating subsidiary. OCC regulations limit the activities of such subsidiaries to those banking activities that their parent national banks may engage in, and operating subsidiaries are treated as part of their parent national bank for purposes of applying federal rules and regulations. In addition, in amendments to federal banking laws, Congress has expressly recognized the important and useful role of national bank operating subsidiaries in the conduct of the business of banking.

Therefore, for at least 40 years, the managers of national banks have had flexibility in structuring their operations: such banks may conduct their banking activities in the bank itself, or they may conduct such activities through operating subsidiaries. In either case, the federal regulatory scheme is the same.

Petitioner and her *amici* fail to address the fundamental issue presented by this case. Because operating subsidiaries simply are an organizational form through which national banks choose to conduct their banking activities, as authorized by Congress and federal bank regulators, a state's attempt to regulate the banking activities of an operating subsidiary constitutes regulation of national banks. If such regulation is permitted, the managers of national banks would face the choice of abandoning the most efficient and beneficial business form for the conduct of their banking activities, or being subject to overlapping and inconsistent regulations in every state and every municipality in which they conduct lending and other banking activities through operating subsidiaries.

By any measure, subjecting the *banking* activities of national bank operating subsidiaries to such regulation would interfere with national banks' powers and frustrate the purposes of the National Bank Act. Unless rejected by this Court, Petitioner's position would undo nearly two centuries of law, dating to *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), zealously protecting the powers of nationally-chartered banks from state and local regulation.

Following the uniform and unanimous decisions of four Courts of Appeals, this Court should affirm what Congress has already decided: that national banks have broad powers to conduct their banking activities, and that the states and localities should not be able to upset the national system of bank regulation simply because national banks elect to make use of the beneficial and efficient business form of the operating subsidiary to conduct some of their banking activities.

ARGUMENT

I. THE NATIONAL BANK ACT GRANTS NATIONAL BANKS THE POWER TO CONDUCT THEIR BANKING ACTIVITIES THROUGH OPERATING SUBSIDIARIES.

In 1864, Congress enacted the National Bank Act to create a "national banking system." *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978). Because Congress recognized that banking would need to evolve to meet the changing needs of the Nation, Congress did not restrict the "business of banking" by attempting to define such business as banking existed in 1864. Rather, the National Bank Act provides that national banks have "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh).[3]

As this Court has held, in the "incidental powers" clause, Congress broadly granted national banks the power to conduct the "business of banking" beyond those "enumerated powers in § 24 Seventh." *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). Moreover, this Court has further recognized that, "[a]s the administrator charged with supervision of the National Bank Act," the OCC "bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *Id.* at 256.

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[3] The National Bank Act also provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law. . . ." 12 U.S.C. § 484(a).

Because the "business of banking" is to be construed broadly, this Court has repeatedly recognized that the OCC is authorized to identify "incidental powers" that are "necessary" for a national bank to "carry on the business of banking." *Id.* at 258-260, 264. The incidental powers of national banks include those activities and structures that are "convenient or useful" in carrying out the business of banking. *See Sec. Indus. Ass'n* v. *Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989); *Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 430 (1st Cir. 1972).

The OCC has long recognized that the "incidental powers" clause includes authority not only for banking services and products but also activities that facilitate a national bank's general operations as a business enterprise. These activities include hiring employees, advertising, issuing stock to raise capital, owning or renting equipment, borrowing money for operations other than through deposits, purchasing assets, and operating through optimal corporate structures such as subsidiary corporations.[4] Indeed, for at least 40 years, the OCC has confirmed that the incidental powers of national banks under Section 24 (Seventh) include the power to conduct their banking activities through the business form of an operating subsidiary.[5]

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[4] *See, e.g.*, OCC Regulation on Electronic Activities, 67 Fed. Reg. 34,992, 34,995 (May 17, 2002) (to be codified at 12 C.F.R. pt. 7); *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 377 (1954).

[5] *See Current Legal and Regulatory Developments*, NAT'L BANKING REVIEW, Dec. 1963 at 264 (a national bank "may carry on indirectly activities which are incidental to banking transactions" through subsidiaries); Testimony of James J. Saxon Before the House Committee on Banking and Currency, June 30, 1965, Office of the Comptroller of

(footnote cont'd)

In 1966, the OCC first promulgated specific regulations authorizing national banks to conduct their banking activities through operating subsidiaries. These regulations limit the activities of operating subsidiaries to those activities that their parent national banks may conduct, and subject the activities of operating subsidiaries to the "same authorization, terms and conditions" that apply to activities of parent national banks.[6]

Under OCC regulations, the operating subsidiary of a national bank is treated as part of the bank for regulatory purposes, and the subsidiary's accounts are fully consolidated with those of its parent bank. *See* 12 C.F.R. §§ 5.34(e)(3), (4). For example, for purposes of filing financial reports (so-called "call" reports) and calculating lending limits and reserves, the accounts of national banks and their operating subsidiaries are aggregated.[7] Thus, the OCC's

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(footnote cont'd)

the Currency, 102ND ANNUAL REPORT 256 (1964) ("It has long been settled law that for various business considerations, a National Bank may carry on certain of its banking activities such as mortgage servicing either directly or through a subsidiary corporation.").

[6] 12 C.F.R. § 5.34(e)(3); *see also* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459 (Aug. 25, 1966) (to be codified at 12 C.F.R. pt. 7) ("A subsidiary operations corporation is a corporation the functions or activities of which are limited to one or several of the functions of activities that a national bank is authorized to carry on.").

[7] *See* 12 C.F.R. § 5.34(e)(4); 12 C.F.R. § 204.3(a); 12 U.S.C. § 84; FFIEC 031, Instructions for Preparation of 031 and 041, available at http://www.ffiec.gov/forms031.htm (last visited Nov. 2, 2006).

regulations make clear that the use of operating subsidiaries does not expand the scope of permissible activities of national banks.

In fact, this Court has recognized that national banks may conduct their banking activities through operating subsidiaries. In *NationsBank*, this Court considered whether the OCC reasonably concluded that the "business of banking" under Section 24 (Seventh) included the sale of annuities. *See* 513 U.S. at 255-56. In that case, the national bank was proposing to sell annuities through an operating subsidiary. *See id.* at 254. In approving the sale of annuities as a permissible part of the business of banking, the Court did not draw any distinctions between the exercise of such incidental banking power through the national bank itself or through such bank's operating subsidiary. *See id.* at 256-61.

Beyond the broad grant of authority to national banks in the National Bank Act, other amendments to the federal banking laws confirm Congress' recognition that operating subsidiaries are a convenient and useful organizational form for such banks. For example, in the 1982 and 1987 amendments to Sections 23A and 23B of the Federal Reserve Act—two of the most fundamental provisions in the federal bank regulatory scheme—Congress explicitly treated certain subsidiaries, including operating subsidiaries, as part of the bank itself and not as a separate affiliate.[8] These

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[8] *See* Garn-St Germain Depository Institutions Act, § 410, Pub. L. No. 97-320, 96 Stat. 1469, 1515-16 (1982); Act of Aug. 10, 1987, Pub. L. No. 100-86, 101 Stat. 552, 564-66 (1987) (amending 12 U.S.C §§ 371c, 371c-1). Moreover, as noted by Respondents, in the Gramm-Leach-Bliley Financial Modernization Act of 1999, Congress recognized that operating subsidiaries of national banks are corporate entities subject to (footnote cont'd)

statutes regulate the quantity and quality of banks' transactions with their affiliates to protect an insured bank (and the deposit insurance fund) from the risk that the bank's assets will be diverted through unsound transactions that benefit its uninsured affiliates. Congress imposed no restrictions on transactions between a bank and its subsidiaries, but did so for transactions between a subsidiary and any company that is deemed a separate bank affiliate.[9]

In addition to Congress and the OCC, the Office of Thrift Supervision and the Board of Governors of the Federal Reserve have promulgated regulations authorizing federal savings associations and state member banks, respectively, to use operating subsidiaries.[10] Echoing the OCC, the Federal Reserve has explained:

(footnote cont'd)

the same terms and conditions that govern the conduct of such activities by national banks. (*See* Resp. Br. at Part I.A.2.)

[9] The legislative history of the Garn-St Germain Depository Institutions Act explained: "[a] majority-owned subsidiary should be regarded as part of its parent bank and therefore, transactions between the two should be unrestricted." S. Rep. No. 97-536, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3085; *see also* FRB Interp. Ltr. No. 3-1177.1 (Aug. 19, 1983) (explaining that Garn-St Germain excluded bank subsidiaries from Section 23A "because Congress viewed transactions involving a bank and its nonbank subsidiaries as akin to internal bank operations.").

[10] *See* 12 C.F.R. §§ 559.3(n)(1), 559.2, 223.3(w), 250.141(c). Furthermore, all 50 states authorize state-chartered banks to establish operating subsidiaries that engage in activities that the bank is authorized to engage in directly. *See* The Conference of State Bank Supervisors, *A Profile of State Chartered Banking*, 20th Ed. 2004-2005, at 40-42.

> One method of organization is through a department of the bank; and an alternative is a subsidiary wholly owned by the bank. The decision as to which of the two is more efficient is one that bank management is best qualified to make, and one that our free enterprise system normally leaves to management in the absence of some overriding public interest. It should be emphasized that the question is purely one of organizational structure, since the subsidiary is strictly limited to functions the bank is already authorized to perform.[11]

In short, under the National Bank Act's broad grant of authority, Clearing House national banks have the power to use operating subsidiaries. Such use is simply an "additional option[ ] in structuring their business" through which national banks may conduct their banking activities. 31 Fed. Reg. at 11460.

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[11] *Federal Reserve Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries: Hearing Before the H. Comm. on Banking and Currency*, 90TH CONG. 28 (1968) (statement of William McChesney Martin, Jr., Chairman of the Board of Governors).

II. OPERATING SUBSIDIARIES ARE A CONVENIENT AND USEFUL FORM OF BUSINESS ORGANIZATION FOR NATIONAL BANKS.

A. The Clearing House National Banks Use Operating Subsidiaries To Perform Many Important Banking Functions.

The Clearing House national banks perform their banking activities through approximately 1,000 operating subsidiaries. The aggregate assets of these subsidiaries total more than $500 billion. Of those operating subsidiaries, 259 interact directly with consumers.[12]

A principal use of operating subsidiaries by Clearing House national banks is mortgage lending, which provides funding for millions of Americans to build and to purchase their homes, thereby strengthening the Nation's economy and social structure. In addition to mortgage-oriented businesses, the Clearing House national banks rely on operating subsidiaries to perform a wide variety of important banking activities, including:

- Small business lending – operating subsidiaries originate and service loans to small businesses. The majority of this lending is done in partnership with the U.S. Small Business Administration, a government agency that acts as guarantor of loans to qualified small businesses.

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[12] According to the OCC, the total number of operating subsidiaries conducting business with consumers is 475. *See* Annual Report of National Bank Operating Subsidiaries That Do Business Directly With Consumers. www.occ.treas.gov/consumer/Report%20-%202006.htm (last visited Nov. 2, 2006).

- Auto financing/lending – operating subsidiaries originate and service auto loans and purchase lease contracts from automobile dealers.
- Student loans – operating subsidiaries originate, manage, market and service student loans. This lending includes partnering with SLM Corporation, a public company (commonly known as Sallie Mae and formerly a government-sponsored entity) that is the nation's leading originator and holder of federally guaranteed student loans.
- Commercial lending – operating subsidiaries originate and service loans for commercial clients.
- Commercial equipment leasing – operating subsidiaries originate, and provide financing for, commercial equipment leases.
- Annuities – operating subsidiaries sell annuities.
- Credit insurance business – operating subsidiaries sell insurance to borrowers against risks such as death, disability, or job loss that could render the borrower/insured unable to make loan payments.
- Administrative support – operating subsidiaries provide a variety of back-office services, including processing and servicing for lending and other activities.
- Funding such as securitization – loan assets for mortgages, credit cards, and auto loans are transferred into operating subsidiaries as part of the process by which such assets are efficiently converted into marketable securities sold to investors.

- Investment advisory business – operating subsidiaries provide consumers with advice for investments in mutual funds and other financial products.
- Broker-dealer services – operating subsidiaries provide retail customers with a range of traditional securities brokerage functions.

Petitioner's position would permit states to regulate—without limitation—the *banking* activities of national bank operating subsidiaries. Thus, state and local regulation of the approximately 1,000 operating subsidiaries of Clearing House national banks would impact not only mortgage lending activities but also dozens of other banking activities of national banks. Such boundless regulation of national banks would affect adversely such banks' ability to provide important banking services to their customers and the communities in which those banks operate.

B. Operating Subsidiaries Permit National Banks To Structure Their Operations Flexibly and Efficiently.

Like other businesses, national banks conduct their banking activities through operating subsidiary structures to promote important business objectives—for the benefit of their shareholders, customers and communities. The "choice of organizational form provides flexibility in business decisions regarding what structure best positions [national banks] to meet customer needs."[13]

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[13] Cynthia Glassman, *Banking Organization: The Debate Surrounding Bank Operating Subsidiaries*, BANKING POL'Y REP., May 3, 1999 at 12 [hereinafter Glassman].

As the OCC has stated, national banks may desire to use operating subsidiaries "for many reasons, including controlling operations costs, improving effectiveness of supervision, more accurate determination of profits, decentralizing management decisions or separating particular operations of the bank from other operations." 31 Fed. Reg. at 11460. Although Petitioner's *amici* focus solely on national banks' use of operating subsidiaries to limit their risk of liability from the investments of the subsidiary businesses—which is, after all, a legitimate business objective—national banks establish operating subsidiaries for many reasons, including the following:

Promoting branding, marketing and corporate culture. Distinct corporate entities such as operating subsidiaries promote branding, marketing and corporate culture.[14] To appeal to diverse segments of their customer base, national banks may give their operating subsidiaries different names. For example, where a national bank has acquired an operating subsidiary, the bank may decide that preserving the distinct corporate entity is the best way to maintain the brand, reputation and culture associated with the acquired company. Or, a bank may use a different name for its operating subsidiary to differentiate that business from the bank's other functions.

Facilitating acquisitions and sales of business lines. The use of operating subsidiaries facilitates the entry, growth and exit of distinct business lines by national banks. It is often more efficient to enter a new business line by acquiring a separate firm already engaged in that business. Many

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[14] *See* Glassman at 14.

Clearing House national banks acquired certain of their mortgage lending operating subsidiaries through such acquisitions. Distinct corporate entities such as operating subsidiaries are easier to value, and the process of transferring a business usually is more efficient and cost-effective by buying or selling the stock in the business, as opposed to a transfer of all its assets and liabilities. Such a stock sale also promotes efficiencies in the transition of employees, payroll, and office space.

For the same reasons, holding a banking business in a separate entity facilitates the bank's ability to sell that entity if the bank later decides to exit the business. The separate entity's management, contractual and other relationships, assets and liabilities can be transferred through a sale of the corporate entity. If an acquired business is formally integrated into the parent bank's operations as a division rather than an operating subsidiary, the process of later disaggregating that business for purposes of a sale likely will be substantially more complicated.

Distinguishing compensation and designating responsibilities. Distinct corporate entities such as operating subsidiaries are effective for adopting specialized compensation structures, which enable national banks to attract highly qualified employees and compete with other firms.[15] For example, the use of operating subsidiaries permits national banks to adopt divergent compensation

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[15] *See* Glassman at 14 (finding that "to prevent clashes within the organization, it is often easier to manage activities with compensation schemes that differ from that of the traditional bank in a separate organization").

structures (commission- or other incentive-based compensation versus flat salaries) in those separate entities. Through the use of operating subsidiaries, a national bank can structure incentive compensation linked to the performance of a separate subsidiary (which maintains separate financial statements and performance statistics). As a recruiting and retention tool, national banks also can give senior executives of a business line, housed in an operating subsidiary, traditional corporate titles such as a CEO or president, not available in the national bank.

Promoting beneficial transactions with third parties. National banks facilitate transactions with third parties by isolating certain businesses or projects into separate operating subsidiaries. For example, a separate subsidiary is a more efficient, and often the only feasible, vehicle for national banks to attract joint venturers or investors in a specific project or business line of the bank. Likewise, national bank shareholders may not want third parties to invest in the bank itself as opposed to a specific line of business. If all the bank's multiple banking businesses are housed in a single national bank, these types of innovative and adaptive structures would not be possible. Moreover, the creditworthiness of a bank business often is easier to assess in a separate corporate entity, thereby facilitating the bank's ability to finance that business (*e.g.*, issuance of a debt instrument by that entity).

Enhancing regulatory review and compliance. Operating subsidiaries permit national banks to house certain activities that may be carried out by a national bank itself but are also subject to complex, federally-mandated regulatory restrictions specific to those activities. For example, some types of lending activities (*e.g.*, loans guaranteed or insured under government programs administered by the Small

Business Administration, the Veterans Administration or the Fair Housing Administration) may be subject to specialized regulatory requirements such as licensing, training for relevant officers, audits, or other requirements. By isolating these audits and requirements into a separate entity, national banks can comply more efficiently and effectively with these special regulatory obligations.

Moreover, a national bank engaging in certain securities activities would be required to register with the Securities and Exchange Commission ("SEC"). Such activities would subject the entire bank to SEC examination as well as complex capital and other substantive restrictions on the business. Without the operating subsidiary structure, national banks and their regulators would face the burdensome task of isolating the activities and personnel within the bank for each of those separate businesses for purposes of different regulatory reviews, or submitting the whole bank to an additional onerous regulatory scheme. Carrying out such activities through a separate corporate entity reduces regulatory burdens and avoids disruption to the bank as a whole.

Other benefits of operating subsidiaries. Through the use of operating subsidiaries, national banks can manage certain tax obligations in a more efficient and effective manner. While national banks may, from time to time, use operating subsidiaries to minimize risk by allocating those risks to particular businesses (which is a legitimate, prudent and widespread use of a subsidiary structure), many of the principal activities conducted by operating subsidiaries, including mortgage lending, are among the least risky of bank activities.

In sum, the Clearing House national banks choose the business form of the operating subsidiary to conduct banking activities for a variety of entirely lawful and beneficial reasons. Through the use of operating subsidiaries, Clearing House national banks realize efficiencies and other advantages that generate increased revenues and assets, which in turn allow such banks to make more loans, provide improved services, and pass along some of their savings through cost reductions. The decision by national banks to conduct permissible banking activities—which those banks can conduct in the bank itself—through the use of such subsidiary business form should not trigger the imposition of a wide array of conflicting state and local regulation.

III. STATE AND LOCAL REGULATION OF NATIONAL BANKS THROUGH THEIR OPERATING SUBSIDIARIES WOULD FRUSTRATE THE PURPOSES OF THE NATIONAL BANK ACT.

A. Petitioner's Attempt To Control the Conduct of National Banks Through Their Operating Subsidiaries Would Interfere Significantly with Such Banks' Exercise of Their Statutory Powers.

The National Bank Act strives for "uniformity"— a national banking system "substantially the same in Washington, in New York, in Boston, and in Chicago," rather than one subject to "complications and differences" under the laws of different states. CONG. GLOBE, 38th Cong., 1st Sess. 1873 (Apr. 28, 1864) (remarks of Sen. Sumner). Essential to such uniformity is "the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose

limitations and restrictions as various and as numerous as the states." *Easton*, 188 U.S. at 229; *see also Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003).

Because of the borderless nature of credit and other banking markets in the United States, national banks must be allowed to operate in multiple jurisdictions pursuant to uniform regulation. Where, as here, a state's attempt to "control the conduct" of national banks "frustrates the purpose of the national legislation," such attempt is "absolutely void." *Easton*, 188 U.S. at 238. A state or locality is prohibited from regulating a national bank where doing so would "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank* v. *Nelson*, 517 U.S. 25, 33 (1996).

Petitioner agrees that a national bank's statutory authority includes the incidental power under Section 24 (Seventh) to use the operating subsidiary structure, as well as the power to engage in the underlying banking activity. In the National Bank Act, Congress sought to enable national banks to conduct their business and to serve their customers in the most efficient and effective manner. Thus, Petitioner would "frustrate the purpose" of the National Bank Act by subjecting a national bank's activities to restrictions "as varied and numerous as the states" simply because those activities are conducted through an operating subsidiary.

Just as this Court has held that a state improperly attempts to "regulate and control the exercise of [national banks'] operations" by applying state laws to the national bank employees, *Easton*, 188 U.S. at 238, a state similarly regulates and controls the bank's operations by applying its laws to such bank's operating subsidiaries. Because the state law at issue in *Easton* (prohibiting an insolvent bank from accepting deposits) could not be applied to the national bank,

this Court held that this law could not be applied to the national bank's president for his actions in carrying out the bank's operations. When a state attempts to apply an otherwise preempted state law to a national bank's employees or to its operating subsidiaries, the state interferes with the bank's power to conduct the underlying banking activity (*e.g.*, lending or deposit taking), and with the bank's incidental power to utilize employees or operating subsidiaries.

This Court should reject Petitioner's attempt to "impair [the] efficiency" of national banks' exercise of their federally authorized powers. *Barnett Bank*, 517 U.S. at 33. If, as Petitioner proposes, state laws apply to operating subsidiaries to a far greater extent than to parent national banks, Clearing House national banks would be forced to choose between the uneconomic and inefficient alternatives of: (i) moving operations back into the national bank itself, foregoing the efficiencies and benefits from housing them in subsidiaries, or (ii) complying with a widely varied and even conflicting panoply of state and local regulation in addition to federal laws.

B. The OCC Engages in Comprehensive and Uniform Regulation of National Banks and Their Operating Subsidiaries.

Petitioner's attempt to subject national banks and their operating subsidiaries to myriad state and local regulations would not fill a regulatory gap but would rather increase the regulatory burden on such banks. Under the National Bank Act, the OCC has plenary licensing, regulatory, supervisory, examination, and enforcement authority over national banks and their operating subsidiaries. This regulatory scheme applies equally to both

national banks and their operating subsidiaries. *See* 12 C.F.R. § 5.34(e)(3).

With more than 1,800 field examiners, the OCC conducts extensive risk-based examinations of national banks and their operating subsidiaries. For purposes of its regulatory review, the OCC does not differentiate between national banks and their operating subsidiaries. If the OCC determines that such subsidiaries are violating any law or regulation, or operating in a manner that threatens the safety or soundness of the bank, the OCC will direct the bank or subsidiary to halt the illegal or unsound practice and take appropriate remedial action. *See* 12 C.F.R. § 5.34(e)(3). To ensure enforcement, Congress has equipped the OCC with effective tools, including forfeiture of charter, civil money penalties, cease and desist orders, restitution, and removal of officers and directors. *See, e.g.*, 12 U.S.C. §§ 93, 1818.

The operating subsidiaries of Clearing House national banks conduct banking activities in all 50 states. Petitioner specifically seeks to apply countless, often unpredictable, overlapping and inconsistent state and local regulation to an area of banking business—mortgage lending, where federal laws and regulations already regulate this banking activity by national banks and their operating subsidiaries.[16] Not only does the OCC enforce these federal

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[16] These laws include the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, the Truth in Lending Act and Home Ownership and Equity Protection Act, 15 U.S.C. § 1601 *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, the Home Mortgage Disclosure Act, 12 U.S.C. § 2801 *et seq.*, the Homeowners Protection Act, 12 U.S.C. § 4901 *et seq.* and the Equal Credit Opportunity Act, 15 U.S.C. § 1691.

laws, but the OCC also enforces state consumer protection laws against operating subsidiaries of national banks—to the same extent that those laws are enforced against parent national banks.[17]

Contrary to the assertions of Petitioner and her *amici*, the OCC's effectiveness cannot be measured by looking solely at the number of formal OCC enforcement actions. These public actions represent just a small fraction of the OCC's ongoing efforts—both formal and informal—to ensure regulatory and legal compliance and safe and sound banking through its regular and rigorous on-site examinations. Numerous full-time examiners are assigned to each large bank, including several Clearing House national banks, and are physically located on the premises of such banks, thereby facilitating efficient and effective examinations. For example, at least three dozen on-site OCC examiners conduct examinations at Wachovia Bank and its operating subsidiaries. And, at the largest national bank, Bank of America, at least five dozen on-site OCC examiners are dedicated to the bank and its operating subsidiaries.

Through this extensive network of examiners interacting with national banks and their operating

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[17] In the Riegle-Neal Interstate Branch Banking and Efficiency Act of 1994, Congress made clear that the provisions of any state law to which a branch of a national bank is subject—including consumer protection and fair lending—"shall be enforced, with respect to such branch, by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B). Moreover, operating subsidiaries, like their parent national banks, also are subject to numerous non-preempted state laws that do not regulate the business of banking, including contract, tort, tax and criminal law.

subsidiaries on a regular basis, the OCC assures that such banks and subsidiaries develop robust compliance regimes that prevent violations. The OCC does so by engaging in intensive examinations of Clearing House national banks and their operating subsidiaries, focusing on the entirety of an institution's lending practice, rather than imposing specific operating practices. This institution-specific approach protects consumers through the examination process without requiring excessive regulations restricting the availability of legitimate credit. Moreover, this approach is effective because during the examination process, managers of national banks usually agree to changes requested by bank supervisors without the need for any formal enforcement action.[18]

In September 2006, as part of the OCC's preventative program, the OCC and other federal banking agencies jointly issued guidance to address the risks posed by non-traditional mortgages, which include residential mortgage products that allow borrowers to defer repayment of principal and sometimes interest. Among other things, the OCC's guidance states that financial institutions should provide consumers with sufficient information about loan terms and associated risks prior to making a product or

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[18] *See* Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE 15.15 (2002) ("To the extent that an agency possesses significant discretionary power over a class of regulatees or beneficiaries, many are likely to 'comply' 'voluntarily' with an agency's 'non-binding' statement of its preferred policies.").

payment choice, as well as implement loan terms and underwriting standards that are consistent with sound lending practices. By contrast, as of the date of the issuance of the guidance, the states have not yet adopted uniform guidance for non-traditional mortgages, or imposed on mortgage brokers the same high standards applied to federally-regulated institutions.

C. State and Local Regulation of Operating Subsidiaries Would Impose Undue Burdens on National Banks and Their Customers.

Subjecting operating subsidiaries to countless state and local laws and ordinances would create an enormous regulatory burden on national banks—to the detriment of their customers, communities, shareholders, and the Nation's economy.

In mortgage lending alone, different states have adopted a patchwork of highly detailed and prescriptive laws regulating virtually every aspect of the lending process. Examples include restrictions on:

- Advertising and disclosure, such as prohibiting the use of certain statements and, in most states, imposing specific required disclosures.[19]

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[19] *See, e.g.*, ALA. CODE § 5-19-6; CAL. CIV. CODE § 1785.20.2; COLO. REV. STAT. § 38-40-102; CONN. GEN. STAT. § 49-6d; 5 DEL. CODE ANN. § 2231(3); FLA. STAT. CH. 494; 38 ILL. ADMIN. CODE § 1050.1110; KAN. STAT. ANN. §§ 9-2208, 50-1006; KY. REV. STAT. ANN. § 291.510; MD. CODE ANN., COM. LAW §§ 12-106, -119, -120, -124.1, -125; MICH. COMP. LAWS § 445.1605, .1636-.1637; MISS. CODE ANN. § 81-18-33; N.Y. BANKING LAW § 595-a; N.C. GEN. STAT. § 24-1.1A(a1); 41 PA. STAT.

(footnote cont'd)

- Applications, including disclosure requirements and various restrictions on the use of "rate lock" or loan commitment agreements.[20]
- Loan terms and conditions, such as limits on possible fees and interest rates, maximum loan terms, maximum and minimum loan amounts, and proscriptions on how loan payments may be applied.[21]
- Post-closing loan servicing, including required disclosures or restrictions on how payments are applied.[22]

While Petitioner seeks to enforce these varied state laws relating to mortgage lending, national banks and their operating subsidiaries already are subject to comprehensive

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(footnote cont'd)

ANN. § 301; TEX. FIN. CODE ANN. § 157.007; W. VA. CODE § 31-17-9; WIS. STAT. § 138.052(7e)(b).

[20] *See, e.g.*, ARIZ. REV. STAT. ANN. §§6-906.C, 6-946.C; 38 ILL. ADMIN. CODE § 1050.1110, 20, 40-60; IOWA CODE § 535.8(2); 10 VA. ADMIN. CODE 5-160-30; ALA. CODE § 5-19-20(b); 10 CAL. CODE REG. § 1950.204; COLO. REV. STAT. § 5-1-301(26)(c); N.Y. BANKING LAW § 6-d; 3 N.Y. COMP. CODE R. & REGS. § 38.3.

[21] *See, e.g.*, VA. CODE ANN. § 6.1-330.71; GA. CODE ANN. § 7-4-17; CAL. CIV. CODE § 2955.5; COLO. REV. STAT. § 5-3-204; 5 DEL. CODE ANN. § 2242; 765 ILL. COMP. STAT. § 915/1; KAN. STAT. ANN. § 58-2312.

[22] *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-909.K; IOWA CODE § 535B.12; 38 ILL. ADMIN. CODE § 1050.840-.850; N.Y. GEN. OBLIG. LAW § 5-501; N.M. STAT. § 56-8-30; N.J. STAT. ANN. § 46:10B-2; N.Y. REAL PROP. TAX LAW § 953(8).

federal law and regulations governing this banking activity. For example, the Truth in Lending Act, the Home Ownership and Equity Protection Act, and the Real Estate Settlement Procedures Act impose loan disclosure and advertising requirements and restrict certain mortgage loan terms.[23] The National Bank Act limits permissible fees and interest rates,[24] and the Equal Credit Opportunity Act imposes loan application requirements.[25] Moreover, the Real Estate Settlement Procedures Act and the Homeowners Protection Act regulate mortgage servicing practices.[26]

Compounding the difficulty of compliance with the regulations of 50 states are the inconsistencies among these regulations. For example, with respect to regulating post-closing fees and payments, New Hampshire permits prepayment penalties at any time so long as there is a conspicuous disclosure to the consumer. *See* N.H. REV. STAT. ANN. § 397-A:15. New York permits prepayment penalties during the first year of the mortgage, *see* N.Y. GEN. OBLIG. LAW § 5-501, and New Mexico and New Jersey have complete prohibitions on prepayment penalties, *see* N.M. STAT. ANN. § 56-8-30; N.J. STAT. ANN. § 46:10B-2.

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[23] 15 U.S.C. § 1601 *et seq.*; *see also* 12 C.F.R. pt. 226; 12 U.S.C. § 2601 *et seq.*

[24] 12 U.S.C. §§ 85, 86.

[25] 15 U.S.C. § 1691 *et seq.*; *see also* 12 C.F.R. pt. 202.

[26] 12 U.S.C. § 2601 *et seq.*; 12 U.S.C. § 4901; *see also* 24 C.F.R. pt. 3500.

With respect to loan terms and conditions, Colorado prohibits subordinate-lien loans when the amount of the loan is $3,000 or less, *see* COLO. REV. STAT. § 5-3-204, while Maine prohibits such small subordinate-lien loans only in cases where the same lender also holds a first mortgage on the real estate at the time of the subordinate-lien loan, *see* ME. REV. STAT. TIT. 9-A § 2-307(2). With respect to late payment charges, many states provide various limits. For example, Delaware limits such charges to 5% of the late payment amount, *see* 5 DEL. CODE ANN. § 2231(2), and Maryland limits such charges to the greater of $2 or 5% of the late payment, *see* MD. CODE ANN. COM. LAW § 12-105.

The uncertain scope of state lending laws also threatens to disrupt securitization markets, which are critical to providing liquidity to mortgage lenders. Credit rating agencies have been unable to provide the necessary rating for mortgage loan pools covered by so-called anti-predatory laws of certain states. For example, Standard & Poor's refused to rate securitized assets that included mortgage loans subject to Georgia's anti-predatory lending law, which imposed punitive damages on all parties involved in the prohibited transaction including any party underwriting the securitization.[27]

Thus, further state and local regulation of Clearing House national banks through their operating subsidiaries would materially increase compliance costs, and ultimately reduce lending and other activities by banks and make those activities more expensive and less available for consumers.

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[27] *See* Agnes T. Crane, *S&P Won't Rate Some Mortgages*, WALL ST. J., Jan. 20, 2003, at B8.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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